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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,	H023404
Plaintiff and Respondent,	(Santa Clara County Superior Court
v.	No. CC103875)
CHARLES EDWARD GLASPER, et al.	
Defendants and Appellants.	

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A jury found defendants Troy Edward Morgan, Charles Edward Glasper, and Julie Ann Glasper[1] guilty of transporting cocaine base (Health & Saf. Code, § 11352, subd. (a)]).[2] Defendants also had been charged with possession of cocaine base for sale (§ 11351.5); Troy was acquitted of this count, while Charles and Julie were found guilty of a lesser-included offense, possession of cocaine base (§ 11350). Troy and Julie were found guilty of possessing drug paraphernalia (§ 11364), and Charles and Julie were found guilty of being under the influence of a controlled substance (§ 11550, subd. (a)). The jury found true an allegation that Charles was on bail when he committed the instant offenses (Pen. Code, § 12022.1)[3], and Charles admitted he had suffered a prior strike conviction (Pen. Code, §§ 667, subds. (b)-(i); 1170.12), he had a previous drug

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[1] We refer to the three defendants collectively as "defendants." Since two defendants share the same last name, we shall refer to each defendant by first name. Charles and Julie also may be referred to as "the couple" or "the Glaspers."

[2] All further statutory references are to the Health and Safety Code unless otherwise specified.

[3] Charles stipulated that, at the time of the charged offenses, he was on bail for a felony within the meaning of Penal Code section 12022.1.

conviction (§§ 11370, subd. (c), 11370.2), and he had served a prior prison term (Pen. Code, § 667.5, subd. (b)). Julie also admitted having suffered a prior strike conviction. The trial court sentenced Charles to 11 years in state prison. It suspended imposition of sentence as to Troy and Julie and placed them on probation upon condition, inter alia, that they serve time in the county jail, Troy for 180 days, Julie for one year.

On appeal defendants contend they were deprived of a fair trial because the prosecution failed to produce plastic in which 14 rocks of cocaine base were wrapped and because the trial court failed to timely provide requested read-back of testimony. Defendants contend their convictions for transportation must be reversed because (1) the jury found the prosecutor did not prove intent to sell or otherwise distribute the cocaine (2) the evidence was insufficient to establish transportation and (3) their trial counsel provided ineffective assistance by failing to object to the prosecutor's misstatement of law regarding the elements of transportation. Charles and Julie contend the evidence was insufficient to establish possession of cocaine base and that they cannot be convicted of both possession and transportation since the crimes involved the same act. Julie and Troy contend the trial court abused its discretion by refusing to sentence them under Proposition 36. Charles and Julie contend they were deprived of their right to confront a key witness and to present a defense when the trial court quashed Charles's subpoena duces tecum directed at obtaining the arrest record of Troy's witness Furnare; Charles contends he was deprived of these same rights when the trial court refused to permit cross-examination of Officer Martin regarding Charles's full admission that he used crack cocaine earlier in the day. Julie contends the trial court abused its discretion in denying her motion to sever; alternatively, she argues that Furnare's testimony should have been excluded. Defendants argue that, assuming no single error was prejudicial, the cumulative prejudice arising from multiple errors mandates reversal of their convictions.

I. Facts

Between midnight and 1 a.m. on March 18, 2001, San Jose Police Officer Erik Martin was driving in his marked patrol car on Brokaw Road where a highway exit ramp intersects the street. A four-door Nissan on the ramp entered the intersection against the red light, and Martin braked to avoid a collision as it turned in front of him. Attempting to make a car stop, Martin pursued with emergency lights on as the Nissan traveled a few city blocks before "running" another red light. By this time, Martin had activated his siren. The Nissan crossed First Street, entered the driveway to a well-lit gas station, and parked next to a pump island. Martin parked behind and to the left. Using his spotlight, Martin saw that Charles was the Nissan's driver, Julie was the front passenger, and Troy sat behind Julie. Before he parked, Martin did not see anyone throw anything from the Nissan.

Within a few seconds of Martin parking, first Charles and then Julie left the Nissan and approached the patrol car. In response to this unusual behavior, Martin quickly left his car. When the three met between their cars, Martin observed signs that the Glaspers were under the influence of a controlled substance[4]. He also noticed that both showed physical signs of long-term cocaine base abuse. Charles told Martin he had been driving although his license was suspended, and Martin learned the Nissan was a rental leased to Julie's employer. As the three spoke, Troy remained in the Nissan. Martin did not see Troy make a throwing motion nor did he see Troy motion towards the driver's side of the car. However, he did not have Troy under continual observation while he dealt with the couple and Troy only was visible from his shoulders up.

Officer Hoag arrived while Martin spoke with the Glaspers. Either he or Martin got Troy out of the car. After running a warrants check on Troy, Hoag gave Troy

[4] Martin noted that Charles was "excited" and that his speech was "rapid," his pupils were "dilated," and his eyes were "bloodshot, watery." He noticed that Julie's eyes were bloodshot and watery, her pupils were dilated, and her arms were "twitching."

permission to use the restroom at a nearby restaurant. When Troy approached the Nissan to get his personal bag from the back seat as Martin started his search in the front passenger area, Martin directed Troy to stand with Hoag. Troy did not exhibit symptoms of being under the influence of a stimulant or of long-term cocaine base use.

Martin found a one-inch piece of plastic with white residue on one side on the front floor board where Julie's "feet would have been[.]" In Martin's experience, this "lick bag" was consistent with a package for cocaine base[5], and a rock of cocaine base (hereinafter "rock") would have left a residue consistent with what was on the plastic. He said this flaking powder that had broken off a rock would not be present if the plastic had been left for any time since it was clinging to the plastic with "static electricity and nothing more."[6] In a pouch attached to the back of Julie's seat Martin found an unused glass tube and a scouring pad, materials that could be used to smoke cocaine base. On the rear passenger floorboard, Martin found a plastic wrapping containing a white chalky substance consistent with cocaine base. Martin said this plastic "package" with a "knot" tied in it was consistent with the plastic in the front of the car.

Martin next walked towards the driver's side door. At his feet, adjacent to the rear door on the driver's side, he found a small piece of black plastic that was "partially wrapped up into a bag, however it had opened." Inside that plastic were 14 small plastic baggies containing the same substance Martin had found in the car. The plastic was eight to twelve inches from the Nissan's left rear door, adjacent to the portion of the raised gas pump island where a garbage can was located. Martin testified "if somebody reached out the back window and dropped something directly down[,] . . . that's where it would

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[5] Martin explained that, typically in San Jose, a round piece of plastic shopping bag is placed flat on one's hand, a rock of cocaine base is placed on the plastic, then the bag is pulled tight and tied in a knot or, alternatively, the rock is placed in a corner of a zip lock bag, tied in a knot, and cut off to make a very small package.

[6] Martin testified that this residue was not tested.

have landed." Martin thought only the rear window on the driver's side was open, although Hoag believed both front car doors were open.

As he entered the station, Martin could not see the area where the black plastic was found. He first saw that area when Charles exited the driver's door. He did not believe the plastic was on the ground when Charles approached the patrol car; because he was "concentrating" on Charles's hands such that, "had [Charles] dropped it as he was walking back, I definitely would have seen that." Martin added that the ground there was "basically gray concrete" and that he believed "the black plastic would have contrasted enough" to be visible.

The wrapping on each of the 14 rocks was consistent with the wrappings found inside the Nissan. They were the same size and had been cut in the same fashion "after the knot was tied, above the knot." The knots also were "very similar," and the rock on the rear floorboard was consistent in size with those found on the ground. Martin testified each of the 15 rocks was a usable quantity, one could obtain several inhalations from each one, and each had a street value of $20. Two of the rocks from the black plastic were found to contain cocaine base. Testimony was presented that laboratory protocol was to test ten percent of a suspected controlled substance "if the items look the same and are from the same location."

Although he did not find pagers or other items associated with sales of narcotics from a residence, Martin believed the cocaine base was possessed for purpose of street sales because a typical "crack" user would buy and use one rock at a time and because the small rocks were individually wrapped, similar in weight and size, and "packaged for sale" in a manner typical in San Jose.

After their arrest, Charles and Julie told Martin they had smoked cocaine base; Charles said he had smoked earlier that evening, Julie said she had done so earlier that day. Martin explained that, although the initial "euphoria high" lasts about 30 minutes,

the effects of the stimulant continue for hours. Blood tests of both Charles and Julie confirmed the presence of cocaine and its metabolite.

While pat-searching Julie, Hoag found a unused devise that is used to smoke "crack" cocaine. Martin did not find large amounts of money on Charles's person. Troy admitted ownership of the pipe and pad in the pouch. Martin testified that Troy's story did not parallel that of the Glaspers, and that his "expensive" shoes, "demeanor," and "actions at the scene" were consistent with somebody "involved in dealing, as opposed to the Glaspers." Martin added that sellers of cocaine base did not often use the drug.

The owner of Castle Staffing of Silicon Valley testified Troy worked as a beer vendor in the San Jose Arena on March 17, 2001 and had signed out at 10:30 p.m.

Danny Furnare testified he was in a county courthouse holding cell with several inmates, awaiting his arraignment, when he overhead an argument between Troy and Charles about their arrest for "dope that was on the ground[]", and who "was gonna take the rap[.]" Furnare said he heard Charles said "the dope was his," although Furnare earlier had told Troy's investigator that the taller of the two admitted possessing the drugs, and Martin testified Troy is taller and substantially heavier than Charles. The trial court took judicial notice that the arraignments for Troy and Charles occurred on April 23, 2001.[7] Furnare testified that, after the holding cell incident, he and Troy often spoke in their dormitory. He added that Troy had asked his name and telephone number prior to his release on bail.

II. Discussion

A. *Brady* Claim regarding Police Failure to Disclose Black Plastic

[7] The court then explained to the jury that the date of the arraignment of the male defendants was "conclusively proved."

Initially, defendants contended their convictions must be reversed because "the prosecution" failed to "preserve and produce" the black plastic containing the rocks of base cocaine found outside the Nissan. (Capitalization and emphasis omitted.) In response, the People claimed defendants waived this issue since they did not raise it in the trial court. Alternatively, the People contended the claim fails since the record shows that "whoever discarded the black plastic bag could not have been aware of its alleged potentially-exculpatory nature" and since the record contains "no indication of 'bad faith' on the part of the police in failing to preserve the piece of plastic." By reply brief, defendants argue that, although they used "the term 'preserve' as well as 'produce' or 'disclose' in [the] opening brief," . . . their "entire argument is clearly based upon *Brady*," i.e., a failure to produce claim, and not upon *Trombetta* or *Youngblood*," i.e., a failure to preserve claim.[8] They explain that their sole contention regarding the black plastic is that the record shows it "was preserved" and that, under *Brady*, "the prosecutor had a duty to disclose it."

On direct examination, when asked whether the piece of black plastic was tested for fingerprints, Martin said he did not believe any latent prints could have been lifted since "it's round so it's not gonna take the contour of the finger very well. And the surface area of each baggie is so small that even if there was a partial print, it probably wouldn't have been enough to come up with a positive comparison to another print." Hoag testified that, at some point, he took custody of the evidence and booked it. He testified he did not have the narcotics envelope in front of him but that, if the rocks had been wrapped in black plastic, he would have booked the plastic into evidence. Criminalist Behnam testified she had not discarded any packaging in this case and that,

[8] *Brady v. Maryland* (1963) 373 U.S. 83; *California v. Trombetta* (1984) 467 U.S. 479; *Arizona v. Youngblood* (1988) 488 U.S. 51.

after her analysis, any packaging she had examined would have been reunited with the physical evidence in this case.

During closing argument, counsel for Charles argued the booking sheet showed Hoag had booked into evidence all of the evidence, that the black plastic was "*missing*," and that its disappearance "prevent[ed] my client and . . . everybody from getting their fair trial." In claiming there were unanswered questions in this case, counsel argued, "*Why was the black plastic bag not booked into evidence* that would show exactly who possessed it?" (Italics added.)

In an opening brief, defendants cited several portions of the record in conceding that the black plastic covering the 14 individually wrapped rocks of cocaine "was not *preserved*." More significant is the fact that their argument regarding prejudice rested upon the claim that, "[h]ad the plastic been *preserved*, [the defendants] could have attempted to lift prints from it." (Italics added.)

Under *Brady*, a prosecutor has a duty to *disclose* all favorable evidence regardless of the absence of a discovery request. (*Kyles v. Whitley* (1995) 514 U.S. 419, 431-433.) As noted above, defendants now claim "it appears from [the] record that the plastic was preserved" and that, under *Brady*, "the prosecutor had a duty to disclose it." To the contrary, nothing in the record supports defendants' belated claim that the black plastic was preserved but not produced. Asked whether the plastic that had contained the 14 rocks was "kept," Martin testified, "It doesn't appear" to be with the 14 baggies in evidence, that it "might be" in another evidence envelope. When asked, "It may have been kept. Right?," Martin responded, "*It may have been*." (Italics added.) Neither Hoag nor the criminalist specifically testified the black plastic had been preserved as evidence, although Hoag generally testified that either he or Martin would have turned in everything they had found.

In light of the record, we agree with the People that, despite defendants' efforts to frame this issue as a failure to *produce* evidence favorable to them, the issue presented

by the briefing, at best, presents a question whether the prosecution failed to *preserve* evidence. Given that none of the defendants raised the failure to preserve issue in the trial court, the claim is waived on appeal. (*People v. Gallego* (1990) 52 Cal.3d 115, 179-180.) However, in order to avoid a possible ineffective assistance of counsel claim by petition for habeas corpus, we briefly address the merits of a failure to preserve evidence claim.

In *People v. Zapien* (1993) 4 Cal.4th 929, 964, the California Supreme Court discussed the applicable law as follows: "In *California v. Trombetta* (1984) 467 U.S. 479, 488-489 [], the high court held: 'Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality [citation], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' [Fn. omitted.] [¶] More recently, in *Arizona v. Youngblood* (1988) 488 U.S. 51, 58 [], the court held that 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' [Citation.] This court has expressly adopted the high court's holdings in *Trombetta* and *Youngblood*. [Citation.]"

There is no indication in the record that the black plastic had independent "significantly exculpatory" evidentiary value; to the contrary, Martin testified it was his belief that a latent fingerprint could not have been lifted from it. Since defendants fail to demonstrate that the plastic had independent significance, we are convinced that neither a motion to suppress evidence nor a motion to dismiss would have been successful. (See, e.g., *People v. Beeler* (1995) 9 Cal.4th 953, 977.) However, assuming the independent significance of the black plastic is now apparent, defendants cannot demonstrate that its significance was apparent to anyone in the police department when the plastic was

either discarded or misplaced. Therefore, defendants cannot meet their burden of demonstrating that police personnel "destroyed" evidence that "might be expected to play a significant role in the [defendants'] defense." (*California v. Trombetta, supra,* 467 U.S. at p. 488; see also, *People v. Zapien, supra,* 4 Cal.4th at pp. 964-965.) Furthermore, since there is no indication that police personnel acted in bad faith in failing to preserve the black plastic, defendants also fail to meet their burden under *Arizona v. Youngblood, supra*. (*People v. Memro* (1995) 11 Cal.4th 786, 831.)

In light of the above, we conclude defendants are not entitled to a reversal based upon the failure to preserve or to produce the black plastic.

B. Quashing of Charles's Subpoena Duces Tecum for Jail Booking Records

Charles and Julie contend they were deprived of their rights to confront a key witness and to present a defense when the trial court quashed Charles's subpoena duces tecum for the arrest and booking records of witness Furnare.[9]

The subpoena and required declaration in support thereof are not part of the record on appeal. However, the record reflects that county counsel, representing the county Department of Corrections (Corrections), filed a motion to quash the subpoena which represented that Charles had subpoenaed Correction's "booking records on a Danny Furnare which cover the period of March 16, 2001, to March 30, 2001," that, in support of the subpoena, Charles alleged Furnare "may be called as a witness to testify about admissions that [Charles] allegedly made to him while in custody, and the booking records will show whether Mr. Furnare was in fact in custody when the alleged admissions were made." The motion indicated Corrections was moving to quash the

[9] Troy's general "joinder" is inapplicable to this claim since Furnare was his witness. (See *People v. Moran* (1970) 1 Cal.3d 755, 762.)

subpoena "on the grounds of privacy" and because the subpoena was prohibited by Penal Code section 13300 ["section 13300"].[10]

On the day county counsel appeared on its motion, defendants and their counsel were present when the court noted, without objection, that "[t]his would pertain only to Charles[]."[11] In response to the motion, counsel for Charles said he was not trying to obtain Furnare's criminal history but only was trying to learn if Furnare was "in custody on a day that he heard this alleged statement take place in the holding cell." Asked if the records were hearsay, counsel for Charles said they come within the public records exception to the hearsay rule. County counsel then argued that booking records are not "public information," that they fall within the provisions of 13300, and that "[t]hey are confidential absent some exception." He argued section 13300 "says booking numbers, charges, dispositions" and that booking records "fall within that definition." Charles replied that the section did not apply since he was not trying to subpoena booking numbers or criminal histories. The court then granted the motion to quash.

"The constitutional provision for privacy is self-executing in creating an enforceable right [citation] and the statutory scheme restricting access to criminal

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[10] Section 13300 provides, in pertinent part, that "(a) [a]s used in this section: [¶] (1) 'Local summary criminal history information' means the master record of information compiled by any local criminal justice agency . . . pertaining to the identification and criminal history of any person, such as name, date of birth, physical description, dates of arrests, arresting agencies and booking numbers, charges, dispositions, and similar data about the person . . . . [¶] (3) 'Local agency' means a local criminal justice agency. [¶] (b) A local agency shall furnish local summary criminal history information to any of the following, when needed in the course of their duties . . . [¶] (8) A public defender or attorney of record when representing a person in a criminal case and when authorized access by statutory or decisional law. . . . [¶] A violation of any of the provisions of this paragraph is a misdemeanor . . . ."

11 Since the trial court specifically limited consideration of the relevant proceedings to Charles without objection from Julie, who was present with counsel, the court was not given notice that Julie was interested in, and possibly impacted by, its ruling. Accordingly, Julie may not join in Charles's claim on appeal. (*People v. Santos* (1994) 30 Cal.App.4th 169, 180, fn. 8.)

history records imposes a duty enforced by sanctions, on public officials to prevent unauthorized disclosure. [Citations.]" (*Craig v. Municipal Court* (1979) 100 Cal.App.3d 69, 76.) However, the state constitutional right to privacy "'is not absolute, but may yield in the furtherance of compelling state interests.' [Citation.]" (*People v. Boyette* (1988) 201 Cal.App.3d 1527, 1532, disapproved on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117.) On the other hand, even if a defendant can show good cause to obtain the sought information, "the right of an accused to obtain discovery is not absolute. 'In criminal cases, the court retains wide discretion to protect against the disclosure of information which might unduly hamper the prosecution or violate some other legitimate governmental interest.' [Citations.]" (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 538.) The trial court balances the sought information's value to the accused against the legitimate interests of others, and we review the decision to quash under an abuse-of-discretion standard. (*Reyes v. Municipal Court* (1981) 117 Cal.App.3d 771, 775.)

We agree with the People that, "[i]f 'non-conviction data,' such as 'arrest' records and 'booking number(s)' are subject to the constraints of the state constitutional right to privacy, . . . under a logical and common sense interpretation of that right . . ., specific information regarding those 'arrest' records, such as Furnare's booking records, are subject to protection under that constitutional right to privacy." (See, e.g., *Westbrook v. County of Los Angeles* (1994) 27 Cal.App.4th 157, 165.)

However, we agree with Charles that his trial counsel fell within the class of individuals permitted access to such local criminal history information, upon a showing of good cause, under subdivision (b) (8) of section 13300.

We are not persuaded by the People's unsupported claim that the trial court properly quashed Charles's subpoena since "there is absolutely no indication that Charles could not obtain" the information he sought "by other means," such as from Furnare's court file. The language of section 13300 does not require a showing that the requesting party cannot obtain the information by other means. As Charles points out, "if

the information was readily available through means employable by the general public . . . , then any claim of privacy or privilege must be deemed waived."

The People's claim that Charles was not prejudiced because the trial court took judicial notice of "its file in this action" is similarly unavailing since the jury was not provided with any information of which the court took judicial notice.

Here, in the absence of any information about the contents of Furnare's booking records, we are in no position to determine whether the trial court's erroneous failure to conduct an in camera hearing would have resulted in an order requiring discovery of information in those records or whether there is a reasonable probability that such information would have altered the trial's outcome with regard to Charles. We believe the appropriate method to resolve this issue is the one selected by the Fifth District Court of Appeal in *People v. Hustead* (1999) 74 Cal.App.4th 410, 417, where the trial court had erroneously failed to conduct an in camera review of a peace officer's personnel file.

In *Hustead*, the Fifth District remanded the matter to the trial court for an in camera hearing with directions that the judgment was to be reinstated if no material was found to be discoverable or if the defendant could not demonstrate that he had been prejudiced by the absence of any discoverable material. The trial court was directed to grant a new trial only if it found discoverable material and the defendant demonstrated prejudice. (*People v. Hustead*, *supra*, 74 Cal.App.4th at p. 419, citation omitted.) We shall order such a remand for Charles.

C. Limitation of Cross-Examination

On direct examination, Officer Martin testified Charles displayed symptoms consistent with being under the influence of a stimulant and that Charles told him that he had "smoked some crack earlier in the evening." During cross-examination, after Martin reiterated that Charles admitted to smoking crack earlier, Charles's attorney asked if the parties could approach the bench. The court said, "No. Try the case by asking." Counsel then asked, "When he admitted to smoking the crack earlier, he admitted to

smoking it actually earlier *downtown in San Jose*. Do you recall that?" (Italics added.) A prosecutorial objection was sustained as "to location because that's hearsay." When counsel asked "to approach, because under [Evidence Code section] 358 [sic]," the court interrupted and told counsel to "[p]roceed."

Charles contends the trial court denied his rights to confrontation and to present a defense when it refused to permit cross-examination regarding his "full admission" that he had smoked cocaine base earlier "in downtown San Jose." He claims his trial counsel should have been allowed, under Evidence Code section 356 ("section 356"), to so inquire because the rest of his statement "regarding when and where he had purchased and used crack earlier was relevant to clarify for the jury . . . whether he would have used again as soon as he obtained another rock" and thus was "relevant to rebut the inference that he possessed the cocaine found in and around the [Nissan]."[12]

Section 356 provides, in pertinent part, that, "[w]here part of an act, declaration, [or] conversation . . . is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a . . . declaration . . . is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." The purpose of section 356 "is to prevent the use of selected aspects of a . . . declaration . . . so as to create a misleading impression on the subjects addressed. [Citation.] Thus, if a party's oral admissions have been introduced in evidence, he may show other portions of the same interview . . . , even if they are self-serving, which 'have some bearing upon, or connection with, the admission . . . in evidence.' [Citations.] (*People v. Arias* (1996) 13 Cal.4th 92, 156.)

We are not persuaded by the People's claim that the question posed by Charles lacked relevant reference to, and was unnecessary to make understood in context, the

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[12] Since neither Julie nor Troy joined in Charles's attempt to raise this issue below, they have waived appellate consideration of this issue. (*People v. Santos* (1994) 30 Cal.App.4th 169, 180, fn. 8.)

admission that Charles had smoked crack cocaine earlier in the evening because the prosecutor only elicited the admission in support of the misdemeanor charge of being under the influence of a controlled substance. To the contrary, the prosecutor argued to the jury that Charles admitted using crack cocaine and that, "if you're gonna use crack cocaine, you have to be in possession of it to use it."

However, assuming arguendo the trial court erred by refusing to permit Martin to testify that Charles said he had smoked the drug in downtown San Jose, we are convinced such error was harmless under any conceivable standard of review. Charles was acquitted of possession for sale and, despite defendants' claim to the contrary, the intent to sell or otherwise distribute a controlled substance, is not an element of the transportation charge.[13] (*People v. Arias*, *supra*, 13 Cal.4th at p. 157; *People v. Watson* (1956) 46 Cal.2d 818, 836-837.) Moreover, Martin testified he saw nothing on the ground near the Nissan before the Glaspers approached him and that it was highly unusual behavior for the couple to exit their car immediately and engage an officer in conversation between their cars. In light of the circumstantial evidence that 14 rocks were dropped from the Nissan while Martin was focusing his attention on the Glaspers, the evidence was overwhelming that both Glaspers knew cocaine base was in the car and that they were in constructive possession of it. Evidence that the three defendants knew there was cocaine base was in the car and that Charles and Julie were, at a minimum, aiding and abetting in its transportation is similarly overwhelming. Charles was driving the Nissan that had belonged to Julie's employer when he went through a red light in front of a marked patrol car. Rather than pulling over in response to the officer's pursuit, Charles kept driving and ran another red light before entering the gas station. As soon as the officer parked, Charles and Julie contacted him between the two cars in an obvious attempt to distract the officer's attention from the fact that Troy was discarding the rocks. We are

[13] We discuss this claim below in section II, subdivision D.

convinced the verdicts in this case would not have been more favorable had Charles been permitted to introduce his statement that he had smoked cocaine base earlier that evening in downtown San Jose.

D. Intent to Sell Controlled Substance an Element of Transportation Charge

In pertinent part, section 11352 provides that "[e]very person who transports, . . . (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, . . . , shall be punished by imprisonment in the state prison . . . . [¶] (b) Notwithstanding the penalty provisions of subdivision (a), any person who transports for sale any controlled substances specified in subdivision (a) within this state from one county to another noncontiguous county shall be punished by imprisonment in the state prison for three, six, or nine years."

Charles and Julie contend a material element for conviction under the transportation component of subdivision (a) of section 11352 is that the defendant intended "to sell, furnish, or otherwise distribute the cocaine." They acknowledge that *People v. Rogers* (1971) 5 Cal.3d 129 (*Rogers*) held to contrary with regard to the sale or transportation of marijuana but argue that, "for the reasons articulated in Justice Mosk's dissenting opinion in *Rogers*, this court should not follow *Rogers*." Alternatively, assuming we follow *Rogers*, they raise "the claim here in order to preserve it for Supreme Court review."

Rogers made clear that "'[t]ransportation of a controlled substance is established by carrying or conveying a useable quantity of a controlled substance with knowledge of its presence and illegal character. [Citations.]' [Citation.]" (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316.) The court noted that the Legislature reasonably had determined that transporting controlled substances of any quantity

"poses greater risks to the public than simple possession does" and that the "increased penalty provided for transportation is intended to discourage sales and purchases; to reduce the incidents of traffic accidents caused by those who might use and be impaired by a controlled substance during its transportation; and to inhibit the use of controlled substances in general by making it difficult to distribute and obtain them." (*Id.* at p. 1317.)

The fact that Charles and Julie were found guilty of possession rather than possession for sale does not take their case out from under the holding in *Rogers*. The purpose of the possession statutes appears to be directed at deterring individuals who personally possess and use controlled substances (*People v. Cortez*, *supra*, 166 Cal.App.3d at p. 1000), while, as explained in *Rogers*, "the Legislature was entitled to assume that the potential for harm to others is generally greater when narcotics are being transported from place to place, rather than merely held at one location. The Legislature may have concluded that the potential for increased traffic in narcotics justified more severe penalties for transportation than for mere possession . . . . Moreover, a more severe penalty for those who transport drugs may have been deemed appropriate to inhibit the frequency of their own personal use and to restrict their access to sources of supply, or to deter the use of drugs in vehicles in order to reduce traffic hazards and accidents, as well as to deter occurrences of sales or distributions to others." (*Rogers*, *supra*, 5 Cal.3d at pp.136-137.) "[S]ection 11352 is intended to inhibit the trafficking and proliferation of controlled substances by deterring their movement." (*People v. Arndt* (1999) 76 Cal.App.4th 387, 398.)

In *People v. Cortez* (1985) 166 Cal.App.3d 994, 997-998, the court rejected the arguments raised by Charles and Julie, and we adopt the *Cortez* reasoning as our own regarding the transportation of methamphetamine: "Appellant[s] argues that section 11352 (transportation of heroin) should not prohibit the transportation of small amounts of heroin for personal use. As appellant acknowledges, our Supreme

Court in [*Rogers*] has spoken to this issue and held contrary to appellant's contention. The court in *Rogers* stated: 'Nor can we agree with defendant's further contention that the offense of illegal transportation requires a specific intent to transport contraband for the purpose of sale or distribution, rather than personal use. Neither the word "transport," the defining terms "carry," "convey," or "conceal," nor section 11531 read in its entirety, suggests that the offense is limited to a particular purpose or purposes. [¶] . . . [I]n the absence of any legislative intent to the contrary, we conclude that section 11531 requires only a knowing transportation of marijuana, whether for personal use, sale, distribution or otherwise.' [Citation.] [¶] We are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 [].)"

We additionally note that, since *Rogers*, the Legislature has not amended section 11352 to specify that a conviction for transportation must include the element of intent to distribute while, on the other hand, it has added subdivision (b) to the statute in 1989 (Stats. 1989, ch. 1102, § 1, p. 3936). We find it significant that only the specific new subdivision, and not the entire statute, provides for an enhanced sentence where the transportation was between "noncontiguous" counties for purposes of sale. (*People v. Kelii* (1999) 21 Cal.4th 452, 457-458 [where statute construed by judicial decision and that construction not altered by subsequent legislation, court presumes Legislature was aware of judicial construction and approved of it].)

E. Court's Response to Jury Request for Readback of Testimony

Defendants contend the trial court erred by failing to provide the jury with its requested readback of a portion of Officer Martin's testimony.

Pursuant to CALJIC No. 17.43, the trial court informed the jury that "[d]uring deliberations, any questions or requests the jury may have should be addressed to the court on a form that will be provided. *Please understand that counsel must first be contacted before a response can be formulated*. [¶] If a read back of testimony is

requested, the reporter will delete objections, rulings, and sidebar conferences so that you will hear only the evidence that was actually presented. [¶] *Please understand that it may take time to provide a response. Continue deliberations until you are called back into the courtroom*." (Italics added.)

The jury deliberated that afternoon and resumed its task the next morning. At approximately 9:30 a.m., it sent a written request for the "[t]ranscribed testimony for Officer Martin, referring *[sic]* to 'watching Mr. Glaspers hands'. Direct and Cross." After the court wrote back that, "in order for a 're-read' to occur, you must specifically identify Q and A or subject of inquiry as opposed to entire testimony," the jury sent out the same request. At that point, the court instructed its clerk to notify counsel.

After the jury's morning break between 10:43 and 10:55 a.m., the trial court informed counsel that the jury sent the above question "out at 9:30. It's now approximately twelve after eleven []."[14] All counsel agreed to stipulate "that as soon as the reporter goes through all the direct and cross" of Martin, she could enter the jury room and read the requested testimony. The court added, "She will have to look it up later. Counsel are free to go." The Clerk's minutes reflect that the court informed counsel that "it will be done as soon as the Conditional Examination that is being conducted on another case is finished" but that, immediately prior to the noon recess, "[t]he jury foreperson informs the Deputy that the jury has reached verdicts without the read back from the reporter."

After the noon recess, all parties were present when the court asked whether the jury still wished to hear the requested read back since "we had not yet had an opportunity to give you the response that you were asking for. I want to make certain. The note

[14] There is nothing in the record that suggests why it took until that time to assemble all parties in order to respond to the jury's request nor is there is anything in the record that supports Troy's assertion that counsel "were apparently not notified of the jury's request until 11:12 a.m."

came out. I couldn't get to it because we were engaged in another matter and Carolyn was reporting that. So we had to finish that before I could free her up to look for the testimony that you had asked for. . . . At about 11:30 we finished that other hearing . . . . Carolyn then started her search for the materials you requested. At twelve noon while she was still searching, the bailiff informed me that the jury had reached a verdict. [¶] Now, listen to my question. *Would you still like to hear the reread testimony that you previously requested, or do you wish to proceed by giving to me the verdict that you have reached*?" (Italics added.) When the foreperson said, "We wish to proceed," the court asked the foreperson to hand the verdict form to the bailiff and then said, "The reason I ask that question is if you wanted the reread, I would have you keep this and have her give to you the reread. But your decision is to give to me this verdict form. Correct?" The foreperson replied, "Yes."

Neither defendants nor their counsel ever asked the trial court to inform the jurors that it would take time for the reporter to complete what she was doing at the moment and to find the relevant testimony before she could read back the requested testimony. Defendants neither objected to the manner in which the court first handled the matter nor did they object to its afternoon comments when it explained to the jury why there had been a delay in presenting the requested readback or when it gave the jurors an opportunity to receive that readback and deliberate further before the court received the verdict forms. In light of the above, the People contend that defendants have waived appellate consideration of this claim.

In reply, defendants note that they have not "challenged the jury's deliberations pending the read-back" and cite *People v. Butler* (1975) 47 Cal.App.3d 273, 283-284, for the proposition that, "[a]lthough the mandate of Penal Code section 1138 is an important protection for a party, it is the right of the *jury* which is the primary concern of the statute . . . . Hence the relative inaction of defense counsel . . . cannot attenuate the jurors' fundamental right to be apprised of the evidence upon which they are sworn

conscientiously to act." Defendants contend that, while it was understandable that the court reporter was not immediately available to assist with the readback, "at a minimum, the court should have informed the jury of the likely delay and advised them of their alternatives." In turn, they claim the "court's failure to communicate the status of the read-back to the jury was tantamount to a refusal to reread testimony because the result was the same."

In *People v. Frye* (1998) 18 Cal.4th 894, 1007 (*Frye*), the California Supreme Court noted that two Court of Appeal decisions, *People v. Butler*, *supra*, 47 Cal.App.3d 273, and *People v. Litteral* (1978) 79 Cal.App.3d 790, had rejected the waiver argument. The *Frye* court did not decide the waiver issue; instead it assumed a violation of Penal Code section 1138 (section 1138) but concluded the assumed error was harmless.

We choose to reach the section 1138 issue on its merits.

Section 1138 provides, in pertinent part, that, "[a]fter the jury have retired for deliberation, if there be any disagreement between them as to the testimony, . . ., they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called." Accordingly, the trial court must "satisfy" the jury's request for read-back of testimony. (*People v. Box* (2000) 23 Cal.4th 1153, 1213 *(Box)*.) While the primary concern of section 1138 is the right of the jury to be adequately apprised, "a violation of the statutory mandate implicates a defendant's right to a fair trial conducted '"substantially [in] accord[ance with] law."' [Citations.]" (*Frye, supra,* 18 Cal.4th at p. 1007.)

We are convinced the jury was apprised of its right to the readback of the evidence it initially had requested and that the defendant's right to a fair trial was not abridged by the jury's decision to withdraw its request in light of its conclusion that it no longer needed that readback since it had reached its verdicts during the unchallenged

continuing deliberations that had ensued. We presume the jury understood and followed the court's instructions. (*People v. Henley* (1969) 269 Cal.App.2d 263, 271.) Pursuant to CALJIC No. 17.43, the jury was informed that once a readback of testimony is requested, counsel must be contacted and that it may take time to provide for such readback. There is no indication the jurors did not understand that there could be a such a delay; to the contrary, no juror asked for the readback when the trial court explained that it was prepared to provided the jury with the requested readback before receiving the verdict.

Section 1138 does not require a trial court to stop jury deliberations while counsel convene and the court reporter prepares to provide the requested readback. (*People v. McCleod* (1997) 55 Cal.App.4th 1205, 1220) The jurors properly continued their deliberations and decided to render verdicts without the benefit of the readback that it initially had requested Nothing in the record suggests the lack of readback prejudiced defendants in any way since the jury did not find defendants guilty of possession for sale, the charge that was the apparent focus of its inquiry regarding whether Martin had continually observed Charles's hands prior to contacting him. Thus, even assuming arguendo the trial court erred, we are convinced that reversal is not required under either the federal or state standard of review. (*Frye, supra,* 18 Cal.4th at pp. 1007-1008.)

F. Sufficiency of Evidence

Julie contends the evidence was insufficient to support her convictions for possession and transportation of base cocaine. Troy raises the same contention as to his conviction for transportation of base cocaine.

In reviewing the sufficiency of evidence, we view the whole record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-578.)

With regard to her conviction for possession, Julie contends the evidence was insufficient to establish her constructive possession of cocaine base since the criminalist failed to test the rock or the residue found in the Nissan and since there was insufficient evidence to link her to the 15 rocks. With regard to their respective convictions for transportation, Julie and Troy contend the evidence was insufficient to establish they knew rock cocaine was present in the Nissan. Troy also argues that, even if the evidence establishes he knew there was cocaine base in the car, the evidence was insufficient to prove that he was criminally liable for its transportation.15

1. Possession of Cocaine Base

"The essential elements of the offense of unlawful possession of a controlled substance are actual or constructive possession in an amount sufficient to be used as a controlled substance with knowledge of its presence and its nature as a controlled substance." (*People v. Rushing* (1989) 209 Cal.App.3d 618, 621.) The narcotic character of a substance may be established by circumstantial evidence. (*People v. Galfund* (1968) 267 Cal.App.2d 317, 320-321.)

Here, Martin, an expert on identification of cocaine base, testified that the residue was a chalky substance the same color as the rock in the Nissan, the rock in the car "was same substance" as the 14 rocks found on the ground, the plastic on the front floorboard was consistent with how rocks of cocaine base are packaged, and that the plastic was

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15 Troy and Julie both comment that the verdicts appear inconsistent since the jury failed to find any defendant guilty of possession for sale and failed to find Troy guilty of possession. However, "[w]hen a jury renders inconsistent verdicts, 'it is unclear whose ox has been gored.' [Citation.] The jury may have been convinced of guilt but arrived at an inconsistent acquittal or not true finding 'through mistake, compromise, or lenity . . .' [Citation.] Because the defendant is given the benefit of the acquittal, 'it is neither irrational nor illogical to require her [or him] to accept the burden of conviction on the counts on which the jury convicted.' [Citation.]" (*People v. Santamaria* (1994) 8 Cal.4th 903, 911.)

consistent with the packaging for the rock on the rear floorboard and the packaging for the rocks outside the car. Martin noted the residue had adhered to the plastic because of static electricity, consistent with the recent removal of the substance from which the residue had broken off. Martin added that the rock in the car was consistent in color, size, and weight with those on the ground. Martin provided his opinion that the residue on the lick bag was "consistent with" residue of crack cocaine and that the wrapped rock on the back floorboard was "consistent with crack." In addition, an analysis of Julie's blood revealed the presence of cocaine metabolites and cocaine, and Julie displayed symptoms of stimulant intoxication.

We conclude substantial evidence exists in the record from which the jury could properly infer that the white substance on the plastic below where Julie had been seated, as well as the packaged rock on the rear floorboard, contained cocaine base.

We next consider Julie's claim that there was insufficient evidence that she constructively possessed the cocaine base.

In addition to the residue found on the lick bag under Julie's feet, the evidence established Julie showed signs of long-term cocaine abuse, she displayed current symptoms of being under the influence of a stimulant, she admitted smoking cocaine base that day, and her blood contained cocaine metabolites and cocaine itself. Julie's admission that she recently had used cocaine, combined with her symptoms and blood content, was evidence that tended to link her with the chalky residue found under her seat. Loss of the remainder of that rock of cocaine by ingestion does not defeat a possession charge. The "fortuitous fact that [Julie] has consumed or ingested the drug . . . [does] not preclude a finding of [her] prior unlawful possession of it." (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242-1243.)

Possession of contraband need not be exclusive, and physical possession is not required. All that is necessary is that the defendant has a measure of control or dominion over the contraband. Mere presence near the contraband, or access to where it is found,

may be insufficient evidence, by itself, to sustain a conviction for possession of contraband, but only slight additional evidence can support a conviction. (See *People v. Rushing*, *supra*, 209 Cal.App.3d 618, 622-623.)

Here, sufficient evidence also supports a finding that Julie constructively possessed the cocaine found in the rear seat of the Nissan and on the ground beside the car. While mere presence in, or mere opportunity of access to, the place where the cocaine was found is not sufficient to prove possession, additional facts exist here. A lick bag was found directly below Julie's seat, a rock of cocaine was found on the floorboard directly behind her seat, and both she and Troy were in possession of unused paraphernalia for smoking cocaine base. Moreover, the jury reasonably could infer that all of the occupants of the Nissan were trying to secrete or dispose of the cocaine base given the length of time it took Martin to stop the Nissan, the fact the Nissan stopped next to a trash can, and the fact the Glaspers tried to divert attention from the Nissan once the officer had parked near it. (*People v. Rushing, supra,* 209 Cal.App.3d 618, 622-623.)

2. Transportation

"Transportation of a controlled substance is established by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character. [Citations.] The crimes can be established by circumstantial evidence and any reasonable inferences drawn from that evidence. [Citations.]" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1746.) A person who has knowledge of the presence of a controlled substance and its illegal character "may be found guilty of illegal transportation if he also has joint or exclusive possession of the drug in a moving vehicle." (*Rogers, supra,* 5 Cal.3d at p. 133-134.)

Here, Charles drove several blocks and ran a second red light despite Martin's attempt to stop the Nisssan with the use of both his emergency lights and siren, and he did not park until he reached the island with the trash bin. Contrary to typical behavior

of individuals who are stopped in a car, Charles and Julie quickly exited the Nissan and walked towards Martin in a manner the jury could infer was meant to distract Martin's attention from Troy and the interior of the Nissan. Troy stayed in the rear seat while Martin contacted Charles and Julie. However, when Officer Hoag arrived, Troy initially tried to walk away, leaving his bag behind. Troy again tried to leave as Martin began his search of the Nissan at a point in time after the black plastic containing the 14 rocks had been deposited outside the Nissan's rear window. When Martin searched the Nissan, he found the wrapped rock of cocaine base where Troy's feet "would have been as he sat in the rear passenger seat." Martin also found unused paraphernalia in a storage pouch in front of Troy's seat.

As in *Meza*, there was ample evidence beyond "mere guilt by association." (38 Cal.App.4th at p. 1746.) For example, the lick bag to which adhered a chalky substance consistent with the rocks was consistent with the packaging of the 15 rocks and was found directly under Julie's seat, Julie exhibited symptoms of being under the influence and admitted smoking cocaine that evening, her blood contained cocaine and its metabolite, and she was in possession of a crack pipe. With regard to Troy, Martin found a packaged rock on the floorboard where Troy had sat, and that item was consistent with the substance and packaging of the 14 rocks found immediately below Nissan's rear window. Additionally, Troy admitted the unused crack pipe in the pouch belonged to him.

Troy and Julie's claim that the evidence could have been interpreted to conclude that either Charles or Troy dropped the plastic and the 14 rocks as Charles exited the Nissan or while Julie and Charles were talking with Martin is futile since we do not reverse "merely because [we] believe[] the evidence is reasonably reconciled with the defendant's innocence [citation.]" when the circumstances support the finding of guilt. (*People v. Meza, supra,* 38 Cal.App.4th at p. 1747.)

Possession is "not an essential element of [transportation] and one may 'transport' [controlled substances] even though they are in the exclusive possession of another. [Citations.]" (*Rogers*, *supra*, 5 Cal.3d at p. 134, fn. omitted.) Here, the jury reasonably could conclude the rocks on the ground, the rock found in the car, and the rock that once had been in the lick bag beneath Julie's seat were from the same batch, and the circumstantial and direct evidence reasonably could be interpreted to establish that Charles and Julie exited the Nissan and approached Martin to distract him from observing Troy throw the rocks from the car. Troy's access to those rocks combined with his consciousness of guilt as shown by his attempt to leave the scene support a reasonable conclusion that he was trying to leave the officers could find the cocaine base.

We conclude sufficient evidence supports the transportation convictions.

G. Severance Motions and Allowing Witness Furnare to Testify at Joint Trial

Julie contends the trial court abused it discretion by denying her motion to sever her trial from that of Troy. She alternatively contends that, since severance was not granted, the trial court should have granted her and Charles' motion to exclude Furnare's testimony because the receipt of that testimony was an *Aranda-Bruton*[16] violation.

Charles sought to exclude Julie's statement at arraignment that she alone had possessed the cocaine base. He also argued that, in the event that request was denied, he should be granted a severance of his trial from hers. When Charles sought to exclude Troy's proffer of Julie's statement on hearsay and reliability grounds, the court asked why he was "acting in [Julie's] shoes" by "arguing to keep out a statement that has nothing to do with [his] client[]." Counsel for Charles said that, given the couple's relationship, he feared the jury would be unable to separate Charles from Julie and would use her

[16] *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*); *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*)

admission against Charles. Counsel noted there was a "confrontation issue" since Julie's statement would impute knowledge to her, and given the relationship and that the couple had gone downtown together, Julie's statement also would incriminate Charles.[17] With regard to Julie's argument that her prior statement should be excluded as unreliable, the court continued that issue for a foundational hearing.

When the court next addressed the severance motion, Charles indicated it was contingent upon whether Julie's statement would come into evidence. Reiterating that the statement would prejudice him, Charles noted that he anticipated Julie would not testify and that he would be unable cross-examine her as to her statement. Giving an "indicated" ruling that the statement did not involve an *Aranda-Bruton* "problem" since it "seems to exonerate" Charles, the court deferred ruling until after the foundational hearing. Counsel for Julie then indicated Julie "would join in the motions made by [her co-defendants] that have been written and presented to the court." Counsel initially indicated Julie's only additional pretrial motion was to sever *all* defendants for purposes of trial since they had "grossly different theories of defense," but he then argued "that having these defendants together, *with the possibility of some of the statements coming in*, doesn't protect the trial [] or constitutional rights of *my* client" given her relationship with Charles and the "significant differences" in the anticipated defenses. (Italics added.)

Because of *Aranda-Bruton* concerns, the prosecutor then indicated he would not seek to offer the Glaspers' statements that Troy was the seller of cocaine base and they were users or Troy's statement that the Glaspers were the sellers and he was the buyer. Charles then suggested he and Julie be tried together and Troy be tried separately. Instead, the trial court concluded that one trial was "appropriate," noting "[t]he mere

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[17] As noted earlier, it was Charles who tried to elicit that he had told Officer Martin he had smoked crack cocaine downtown earlier that evening

fact that you have clients pointing the finger at each other does not give rise to severance. For judicial economy, the facts are the same."

After a foundational hearing regarding the admissibility of Julie's statement, the trial court excluded the statement as unreliable. It then ruled the severance motion that Charles had made was "moot and no ruling is required."

After he had called all of his witnesses, the prosecutor raised "an *Aranda* issue" with regard to the proposed testimony of Danny Furnare. The court gave an "indicated" ruling that Furnare could not testify "to any statement by [Charles] relative to his wife and ownership [or] possession . . . relative to the drugs." Julie objected that it was impossible to adequately "sanitize" Furnare's statements to avoid their prejudicial effect, but the court disagreed. It allowed Furnare's prospective testimony, excluding any reference to Julie regarding Charles's statements in the holding cell.

1. Severance

"Under [Penal Code] section 1098, '[w]hen two or more defendants are jointly charged . . . they must be tried jointly, unless the court order[s] separate trials.' In light of this legislative [and electoral] preference for joinder, separate trials are usually ordered only '"in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony."' [Citation.] A trial court's ruling on a severance motion is reviewed for abuse of discretion on the basis of the facts known to the court at the time of the ruling. [Citations.]" (*People v. Box* (2000) 23 Cal.4th 1153, 1195.)

The primary ground for Charles's severance motion was the alleged inculpatory effect of Julie's statement that only she had possessed the cocaine base. While Julie's counsel made non-specific comments about the alleged effect of potentially incriminating statements of possible witnesses, we agree with the People that counsel's comments could not have alerted the trial court that Julie was raising an Aranda-Bruton issue

regarding Furnare's testimony. Accordingly, any discussion of Furnare's testimony is irrelevant to the issue of whether the trial court abused its discretion in denying the motions to sever. (*Id*. at pp. 1195-1196.)

Even in a joint trial involving only the Glaspers, Julie's admissions at arraignment and the Glaspers' admissions to Officer Morgan would have been admissible since the trial court had determined that evidence of statements by either Julie or Charles would only come in as to the defendant who made the statement. (Cf., *People v. Box, supra,* 23 Cal.4th at p. 1196.) At such a trial, both defendants would have had a constitutional right not to testify, and no evidence was presented below that the jointly tried Glaspers would have offered exculpatory evidence in a separate trial of the other. (Cf., *People v. Cummings* (1993) 4 Cal.4th 1233, 1286 *(Cummings)*.) Furthermore, once the court excluded Julie's arraignment admissions and found that Charles's severance motion was moot, neither Glasper made any further offer of proof as to the alleged prejudicial effect of a joint trial.

Severance was not required merely because the defenses of each defendant were antagonistic: "That each was involved in the incident was undisputed, however, and the prosecution had offered evidence sufficient to support verdicts convicting [all] defendants. . . . [T]his was not a case in which only one defendant could be guilty. . . . Here the prosecution theory was that both defendants participated in, and were guilty of, the [crimes]." (*People v. Box*, *supra*, 23 Cal.4th at p. 1197, quoting from *Cummings*, *supra*, 4 Cal.4th at p. 1287.) It is a "rare case" that requires a trial court to sever because of codefendants' "antagonistic" defenses since, "[i]f the fact of conflicting or antagonistic defenses alone required separate trials, it would negate the legislative preference for joint trials and separate trials 'would appear to be mandatory in almost every case.' [Citation.]" (*People v. Morganti* (1996) 43 Cal.App.4th 643, 672-673.) This "case, which involved defendants charged with common crimes involving common events . . . fits within the Supreme Court's definition of a classic case for a joint trial.

[Citations.]" (*Id*. at p. 672.) Accordingly, we conclude the trial court did not abuse its discretion in denying the requested severances.

2. Aranda-Bruton Issues

In *People v. Douglas* (1991) 234 Cal.App.3d 273, 281-282, the court explained that the *Aranda* court had set out "'judicially declared rules of practice' for the implementation of section 1098 when one defendant's confession is to be admitted at a joint trial. [¶] When the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a codefendant, the trial court must adopt one of the following procedures: (1) It can permit a joint trial if all parts of the extrajudicial statements implicating any codefendants can be and are effectively deleted *without prejudice to the declarant.* By effective deletions, we mean not only direct and indirect identifications of codefendants but any statements that could be employed against nondeclarant codefendants once their identity is otherwise established. (2) It can grant a severance of trials if the prosecution insists that it must use the extrajudicial statements and it appears that effective deletions cannot be made. (3) If the prosecution has successfully resisted a motion for severance and thereafter offers an extrajudicial statement implicating a codefendant, the trial court must exclude it if effective deletions are not possible.' [Citation.] [¶] In *Bruton v. United States* (1968) 391 U.S. 123 [], the United States Supreme Court held that use of a codefendant's confession inculpating the defendant in a joint trial violates the nonconfessing defendant's right of cross-examination secured by the confrontation clause of the Sixth Amendment. The violation is not cured by a jury instruction that the confession should be disregarded in determining the nonconfessing defendant's guilt or innocence. [Citation.]" (Emphasis omitted.)

Aranda and Bruton are violated "when a nontestifying codefendant's confession (or declaration against penal interests) directly implicates the defendant's participation in the crime and the confession is admitted into evidence. [Citation.]" (*People v. Bryden* (1998) 63 Cal.App.4th 159, 174.) We find it significant that there was no direct

implication of Julie in the charged crimes by the introduction of Charles's alleged admissions to Furnare and that the trial court instructed the jury not to consider Furnare's statement against either Julie or Troy. We also find it significant that the only alleged prejudice is that, since the Glaspers were married and together, the jury might impute the statements of one spouse to the other.

In light of the above, we are convinced the trial court's admission of Furnare's testimony did not deprive Julie of Julie's Sixth Amendment right to confrontation.

H. Propriety of Convictions for Both Possession and Transportation

Julie and Charles contend they should not have been convicted of both possession and transportation of cocaine because the charges "arise out of the same criminal act." Acknowledging our decision in *People v. Thomas* (1991) 231 Cal.App.3d 299 (*Thomas*), they ask us to reconsider that decision.

Under the facts of this case and the rationale of *Rogers*, possession was not a lesser-included offense within the transportation count. As noted above, under the Supreme Court's analysis in *Palaschak*, the jury properly could have found Julie guilty of possession based simply upon her symptoms, blood content, admission, and the lick bag found under her seat. The same would be true for Charles given his blood content, symptoms, and admission combined with Martin's testimony that each rock of cocaine base can be used for several inhalations.

As discussed above, a reasonable jury also could have concluded that both Glaspers had been in either actual or constructive possession of the rock found both inside and outside of the Nissan. (See *Rogers*, *supra*, 5 Cal.3d at p. 134, fn. 3; cf., *Thomas*, *supra*, 231 Cal.App.3d at p. 304.)

In *Thomas*, we noted *Roger's* dicta in a proceeding under the Indeterminate Sentencing Law, that where "'possession is incidental to, and a necessary part of, the transportation charged, and no prior, different, or subsequent possession is shown, the offense of possession is deemed to be necessarily included in the offense of

transportation, and the defendant may not be convicted of both charges. [Citations.]' (5 Cal.3d at p. 134, fn. 3.)" (*Thomas*, supra, 231 Cal.App.3d at p. 304.) We then distinguished the ISL cases as follows: "However, the current test of a necessarily included offense directs us to a different result. 'An offense is necessarily included within a charged offense '"if under the statutory definition of the charged offense it cannot be committed without committing the lesser offense, or if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed."'" (*People v. Toro* (1989) 47 Cal.3d 966, 972 []; [citation].) [¶] In the present case appellant does not attempt to argue that his possession of cocaine meets either condition of this test. By definition possession is not an essential element of transportation because the latter offense can be committed without also committing possession. [Citation.] Nor does appellant suggest the language of the information creates a necessarily included offense, since it does not describe the alleged transportation in such a way that if transportation was committed as specified, the possession necessarily was also committed. [¶] Instead, appellant seeks an expansion of the 'necessarily included' definition to encompass cases in which the facts make it impossible to commit one offense without also committing another. Our Supreme Court, however, has previously expressed its reluctance to enlarge the meaning of the term [citation], and we see no reason to do so here. Accordingly, in considering whether one offense is necessarily included in another for purposes of striking the conviction on the lesser offense, we believe our inquiry must be confined to a comparison of the statutory elements and charging allegations of each crime according to the current test articulated in *Toro*." (*Thomas*, *supra*, 231 Cal.App.3d at pp. 305-306, fn. omitted.)

We found support for our analysis in our earlier holding in *People v. Superior Court (Himmelsbach)* (1986) 186 Cal.App.3d 524, 527, fn. 7, that under *People v. Pearson* (1986) 42 Cal.3d 351, only the statutory elements may be

considered in determining if an offense is lesser included. We noted that "[a]ppellant was found guilty of two offenses, possession of cocaine base and transportation of cocaine base, arising out of the same act of carrying the contraband in an automobile in his possession. The appropriate procedure was not to invalidate the conviction of the lesser offense, but '"to eliminate the effect of the judgment as to the lesser offense insofar as the penalty alone is concerned."' [Citation.] Here the trial court properly eliminated the punitive consequences of the double conviction by staying execution of the sentence on the simple possession count." (*Thomas*, *supra*, 231 Cal.App.3d at pp. 306-307.)

Adhering to our reasoning in *Thomas*, we note that, in the instant case, the trial court appropriately stayed Charles's sentence for the possession count pursuant to Penal Code section 654.

I. Ineffective Assistance of Counsel

While it is improper for the prosecutor to misstate the law in an attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on every element, "[a]s a general rule a criminal defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion - and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Hill* (1998) 17 Cal.4th 800, 803.) Defendants contend the prosecutor misstated the law concerning the material elements of the crime of transportation by arguing that transportation is a "general" intent crime and that their trial counsel provided ineffective assistance by failing to object to the alleged prosecutorial error.

"A defendant seeking relief on the basis of ineffective assistance must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 440.) In the context of claimed prosecutorial error

in argument, defendants "'must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*Frye*, *supra*, 18 Cal.4th at p. 970.) We "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

With regard to the transportation charge, the court instructed the jury, in pertinent part, that "[i]n order to prove this crime, each of the following elements must be proved. There are two: [¶] One, a person transports cocaine base, a controlled substance; [¶] And two, that person knew of its presence and nature as a controlled substance." (CALJIC No. 12.02.)

The prosecutor then argued he had to prove that "[a] person transported cocaine base and that person knew of its presence and its nature as a controlled substance. [¶] . . . That means that someone has crack cocaine and they know that they have crack cocaine and they know that the substance that they have is crack cocaine and they move it from one location to another." He argued all three defendants had knowledge of the cocaine base, and he explained how a principal would transport cocaine base and how someone was culpable if they aided and abetting in that transportation. In response, Charles's trial counsel argued there was no circumstantial evidence showing Charles knew he was transporting drugs at the time, and Julie's counsel argued Julie did not transport the cocaine base. Troy's counsel argued the Glaspers, and not he, had possessed the rocks but that, even if he knew Charles was transporting the cocaine base, Troy was not guilty of transportation unless Charles had "transferred" some of the drug to Troy while they were in the car because "[y]ou have to transport it yourself. So if you find

that [Charles] had the fourteen rocks and he was driving, and/or even [Julie] had the fourteen rocks but my client didn't know about the rocks, then he can't be convicted of transportation." In rebuttal, the prosecutor argued the case "comes down to knowledge. . . . You look at each person individually and decide whether or not they knew the narcotics were in the car. And if you have . . . these three people in the same vehicle, it's clear that they knew that there was *[sic]* narcotics in the car. [¶] . . . You have [Charles] who is the driver of the car and he was high. You have [Troy] who was in possession of the drugs and had paraphernalia. You had [Julie] who was high and had possession of paraphernalia and had control and custody of the car. There is enough culpability to go around for you to determine that they all knew. [¶] If they knew the drugs were in the car, they are guilty of transportation. If you go back and you determine that [Charles] knew the drugs were in the car, he's guilty of transportation. *It's a general intent crime.* If you determine that [Troy] knew the drugs were in the car, he's guilty of transportation. *It's a general intent crime*. If you go back and you determine that [Julie] knew that the drugs were in the car, she's guilty of transportation. *It's a general intent crime*." (Italics added.)

The prosecutor's challenged statements that the transportation charge is "general intent" crime did not misstate the law. While "'[k]nowledge' by the defendant of both the presence of the drug and its narcotic character is [a]n essential element of the offense of transportation[]" (*Rogers*, *supra*, 5 Ca1.3d at p. 133), that does not convert the offense to a specific intent crime. In *People v. Daniels* (1975) 14 Cal.3d 857, 860, the court recognized that "[t]he terms 'specific' and 'general' intent have been notoriously difficult to define and apply. [Citation.] While both terms have been employed in more than one sense, . . . , we have stressed an important temporal difference and have observed: 'When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to

be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.' [Citation.]"

In holding the sale of a controlled substance was a general intent crime, the *Daniels* court reasoned as follows: "The statutory definition of the offense focuses on the act of the sale itself to which the courts have added the element of knowledge of the character of the substance sold. [Citations.] [¶] It is apparent that the offense defined in former section 11912 does not expressly require an intent 'to do a further act or achieve a future consequence' [citation]. Further, it does not appear that such an intent is implicit in that section as a prerequisite to a conviction of that crime in cases where, as here, the alleged sale consists of the simultaneous transfer of a restricted dangerous drug to another for cash . . . . [¶] In the matter before us it is sufficient for a conviction that the defendant intentionally did that which the law declares to be a crime [citations], i.e., that he intentionally sold (transferred to another for cash) a restricted dangerous drug with knowledge of its character. Proof that he intended to violate the law is not required. [Citation.] No other intent is required. We conclude that selling a restricted dangerous drug (in the sense of transferring it to another for cash) is a general and not a specific intent crime." (14 Cal.3d at pp. 860-861.)

By analogy, we conclude that transportation of a controlled substance is a general intent crime. However, assuming arguendo the prosecutor erred by labeling transportation a general intent crime, defendants cannot establish prejudice since the instructions[18], together with the argument presented by all parties, including the prosecutor,

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[18] The trial court informed the jury that, if any characterization of law by an attorney conflicted with the court's instructions, it must follow the court's instructions. (CALJIC No. 1.00.) It instructed regarding the amount of circumstantial evidence necessary to establish the necessary specific intent for the possession for sale count (CALJIC No. 2.02) and explained that the remaining counts were "general intent" crimes, defining what constitutes "general criminal intent" (CALJIC No. 3.30) as well as principals and

left no doubt that the jury could not convict a defendant of transportation unless the evidence demonstrated beyond a reasonable doubt that he or she had knowledge of the cocaine base and its nature as a controlled substance and that he or she acted as a principal in the transportation or aided and abetted another defendant in transporting the cocaine base.

Accordingly, defendants' ineffective assistance claim is not well taken. (*People v. Price*, *supra*, 1 Cal.4th at p. 440.)

J. Cumulative Error

Defendants contend that even if the errors alleged above are not in themselves reversible, they are so cumulatively. We disagree.

As noted above, we shall remand Charles's case to the superior court for the court to conduct an in camera hearing on his request for discovery of the information in witness Furnare's booking records from March 16, 2001, to March 30, 2001, regarding whether Furnare was in custody on the date of the arraignment for Charles and Troy.

With regard to the other contentions discussed above, we conclude that the few errors that may have occurred during defendants' trial were harmless whether considered individually or collectively. Defendants were entitled to a fair trial, not a perfect one. (*People v. Cain* (1995) 10 Cal.4th 1, 82.)

K. Exclusion of Troy and Julie from Diversion Provisions of Proposition 36

Julie and Troy contend the trial court abused its discretion by finding them ineligible for "treatment" under the provisions of Proposition 36, the Substance Abuse and Crime Prevention Act of 2000 (Pen. Code, §§ 1210, 1210.1 ("sections 1210 and 1210.1").[19] They claim the jury's decision to acquit them of possession for sale and to

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aiding and abetting. (CALJIC Nos. 3.00 & 3.01.) The court also instructed on the elements of the transportation count. (CALJIC No. 12.02.)

[19] Charles joined in Julie and Troy's Proposition 36 arguments. However, as he conceded in not seeking Proposition 36 diversion at sentencing, Charles was statutorily

find them guilty of the lesser included offense of possession precluded the trial court from making a factual determination that there was evidence the cocaine base found outside the Nissan was possessed *for purposes other than personal use*. They also claim the trial court erred by excluding them from Proposition 36 treatment since the prosecutor failed to specifically allege the transportation was not for personal use and the jury made no such finding while rendering verdicts consistent with a conclusion of transportation for personal use.

In relevant part, section 1210 provides that, "[a]s used in Sections 1210.1 and 3063.1 of [the Penal] code, and Division 10.8 (commencing with Section 11999.4) of the Health and Safety Code: [¶] (a) The term "*nonviolent drug possession offense*" means the *unlawful* possession, use, or *transportation for personal use* of any controlled substance identified in Section 11054 [through] 11058 of the Health and Safety Code, or the offense of being under the influence of a controlled substance in violation of Section 11550 of the Health and Safety Code. The term "*nonviolent drug possession offense*" *does not include the possession for sale*, production, or manufacturing of any controlled substance . . . . " (Italics added.)

In relevant part, section 1210.1 provides that "(a) [n]otwithstanding any other provision of law, and except as provided in subdivision (b), any person *convicted of a nonviolent drug possession offense* shall receive probation. As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program. . . . A court may not impose incarceration as an additional condition of probation. . . . [¶] (b) Subdivision (a) does not apply to . . . [¶] (1) Any defendant who previously has been convicted of one or more serious or violent felonies in violation of subdivision (c) of Section 667.5 or Section 1192.7, unless the nonviolent drug possession

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ineligible for diversion under Proposition 36. (§ 1210.1, subd. (b)(1); see e.g., *People v. Superior Court (Henkel)* (2002) 98 Cal.App.4th 78, 82-83 (*Henkel*).)

offense occurred after a period of five years in which the defendant remained free of both prison custody and the commission of an offense that results in (A) a felony conviction other than a nonviolent drug possession offense . . . ."

At the sentencing hearings in question, the trial court determined *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) was inapplicable since the statutorily-imposed maximum punishment was not increased.

Troy then argued the verdicts indicated he had been convicted of transportation on a "vicarious" liability theory, and that, since the Glaspers were convicted of simple possession, he only was vicariously liable for the transportation of the cocaine base for the Glaspers' personal use. Julie argued that, in contrast to Troy's situation, the jury specifically made a "finding" that she had not possessed cocaine for anything other than "straight" possession in light of its acquittal of the greater offense of possession for sale and verdict of guilty as to "simple" possession. She argued the "finding" applied to the transportation count and that the jury thus specifically found she transported the cocaine base for personal use. The trial court indicated that, in its experience, given the instant facts, the 14 rocks were "not possessed for simple possession" but for sale. After considering the trial testimony and noting that the jury verdicts were not necessarily inconsistent, the court found both Troy and Julie ineligible to participate in the Proposition 36 program. For the reasons stated below, we conclude the trial court properly rejected the defense argument that the Proposition 36 created a new *crime* of transportation for personal use and thus contemplated a jury finding regarding a defendant's eligibility for such diversion in a transportation case. We similarly conclude the trial court correctly determined that it had "the inherent authority" to consider the trial testimony in determining a defendant's eligibility for Proposition 36.

"The declared purpose of Proposition 36 is to 'divert from incarceration into community-based substance abuse treatment programs nonviolent defendants,

probationers and parolees *charged with simple drug possession or drug use offenses*.' [Citations.]" (*People v. Superior Court (Turner)* (2002) 97 Cal.App.4th 1222, 1226.)

In interpreting the "washout" provisions of section 1210.1, subdivision (b)(1), the court in *Henkel* reviewed the relevant voters' materials to ascertain the Electorate's intent in enacting Proposition 36. (*Henkel*, *supra*, 98 Cal.App.4th at pp. 82-84 & fn. 3.)[20] As relevant the *Henkel* court noted that the ballot argument in favor of Proposition 36 indicates "the initiative was intended to exclude any defendant who was more than a 'simple, non-violent drug offender:' 'Proposition 36 . . . only affects those guilty of simple drug possession.' " (*Id*. at p. 83.)

Proposition 36 should not be interpreted to frustrate the intent of the Electorate. (*People v. Delong* (2001) 93 Cal.App.4th 562, 569.) Its words "should be given the meaning they bear in ordinary use. [Citations.] If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the . . . voters . . . . [Citations.] [¶] But the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter much be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.] An interpretation that renders related provisions nugatory must be avoided [citation]; each sentence must be read not in isolation but in the light of the statutory scheme [citation]; and if a

[20] Pursuant to California Rules of Court, rule 41.5, we take judicial notice of that portion of the 2000 General Election Voters' Pamphlet dealing with Proposition 36.

statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation].' [Citation.]" (*People v. Barasa* (2002) 103 Cal.App.4th 287, 291-292 (*Barasa*).)

Here, we are convinced the intent of the Electorate to strictly limit the use of Proposition 36 to those involved in simple drug possession for personal use would be frustrated were we to accept the argument that a defendant must be given Proposition 36 diversion unless the prosecution pleads and the jury finds that the felony of transportation was for something other than personal use.

One can be convicted of transportation even if acquitted of possession for sale, or even simple possession. (*People v. Emmal*, *supra*, 68 Cal.App.4th at p.1317.) The trial court's determination that Julie and Troy were involved in more than simple possession for their own personal use was based on the 14 rocks of base cocaine found *outside* the car. The jury properly could have found the Glaspers guilty of simple possession based solely upon their symptoms, their admissions, their blood content and the lick bag.

For the reasons stated in *Barasa*, we are not persuaded by the claim that Proposition 36 created a new crime of transportation for personal use or that it created a sentencing enhancement that required the jury, under *Apprendi*, to make a finding beyond a reasonable doubt that the controlled substance was not possessed for personal use before a court can preclude a convicted defendant from the ameliorating provisions of section 1210.1.[21] We agree with the *Barasa* court that *Apprendi* does not apply here because "the issue concerns a sentencing provision which lightens, rather than increases,

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[21] With regard to the argument that, in order to preclude eligibility for Proposition 36 diversion under a transportation conviction, *the prosecutor must allege,* and the jury must find that the transportation was for other than personal use, we note that defendants were possibly eligible for Proposition 36 diversion only because *sentencing occurred after the effective date of the proposition.* (See, e.g. *People v. DeLong* (2001) 93 Cal.App.4th 564, 570.) The complaint in this case was filed in March 2001, and the information was filed the following month.

punishment for crime. Because Penal Code section 1210.1 effects a sentencing *reduction*, rather than an *increase* in the 'prescribed statutory maximum' sentence, the analysis of a related sentencing provision which also provides for a possible mitigation of punishment, rather than an increase in the prescribed statutory maximum punishment, is applicable." (*Barasa*, *supra*, 103 Cal.App.4th at p. 294.)

We adopt the following reasoning in *Barasa* as our own: "[W]e . . . look only to determine whether the statutory language which applies to this case places the burden of proof as to whether or not an amount transported was for 'personal use' on the prosecution . . . or upon the defendant . . . . [¶] Under the standard of review we have cited, we must read the language of the enactment in context, and the context, a clearly stated requirement that probation be granted in personal-use amount cases, demonstrates no more than this: in personal use amount cases, a prosecutor may not avoid the application of Proposition 36 simply by charging the offense as a transportation rather than as a possession. Thus, read in context, the 'transportation' offense is not divided into degrees by Proposition 36; rather, where the transportation is of an amount for personal use, probation may be available to a defendant who can show that he comes within this exception. [¶] Thus, where transportation is alleged and proven, the central and dispositive question is whether [the defendant] or the People had the burden on the question of whether the drugs he transported were for personal use. [Julie and Troy] argue[] the People must prove the negative; that is, the drugs transported were transported for commercial rather than personal usage. We disagree, as the law is clearly settled to the contrary: As provided by Evidence Code section 500: 'Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.' Once this initial burden is met, the opposing party will be charged with producing its own evidence as to the matters established. "(a) The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact

would be required in the absence of further evidence. [¶] (b) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact." [Citation.] '"Burden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue.' (Evid. Code, § 110.) Thus, if a plaintiff presents evidence to establish each element of its case, the defendant has the burden of going forward with its own evidence as to those issues. This does not alter the ultimate burden of proof, which rests with the plaintiff to prove each of the relevant facts supporting its cause of action.' [Citation.]" (*Barasa*, *supra*, 103 Cal.App.4th at pp. 295-296, fn. omitted.)

We agree with the People that it appears illogical to suggest, in light of the judicial construction of previous legislatively enacted diversion statutes (§ 1000 et seq. [drug diversion]), that, in the absence of some explicit or implicit indication, the Electorate intended the trial court to lose its traditional judicial power to determine whether a defendant is eligible for a diversion-type program. (See, e.g., *People v. Williamson* (1982) 137 Cal.App.3d 419, 421-423.) In that regard, we note that "[p]rinciples of interpretation caution against reading a statute so as to achieve absurd results, or results inconsistent with the apparent legislative intent. [Citation.]" (*Estate of Peterson* (1999) 72 Cal.App.4th 431, 437.)

In summary, we conclude the trial court properly denied the motions for diversion under Proposition 36.

III. Disposition

The judgment as to Julie Glasper and Troy Edward Morgan is affirmed.

The judgment as to Charles Edward Glasper is reversed, and the matter is remanded to the trial court for the limited purpose of having the trial court conduct an in camera hearing on Charles Glasper's request for discovery of the information in witness Furnare's booking records from March 16, 2001, to March 30, 2001, regarding whether Furnare was in custody on the date of the arraignment for Charles Glasper and Troy

Morgan. If the court finds no discoverable information, it shall reinstate its original judgment. If the court finds relevant discoverable information in Furnare's booking records, Charles shall be given the opportunity to demonstrate that this information would have led to relevant, admissible evidence that he could have presented at trial and that he was prejudiced at trial by the absence of this evidence. If the trial court determines that Charles was prejudiced by the absence of this evidence, it shall order a new trial for him. If it determines that Charles was not prejudiced, it shall reinstate its original judgment.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Wunderlich, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,	H023404
Plaintiff and Respondent,	(Santa Clara County Superior Court
v.	No. CC103875)
CHARLES EDWARD GLASPER, et al.	
Defendants and Appellants.	

_____/

The written opinion which was filed on October 31, 2003, is certified for partial publication pursuant to California Rules of Court, rule 976(b). Parts to be published are the Introduction, Part I, Subpart K of Part II, and the Disposition.

It is therefore ordered that the above opinion be partially published in the Official Reports.

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Honorable Robert Ahern
Attorney for Respondent The People:	Jeffrey M. Bryant
Attorney for Appellant Troy Edward Morgan:	Bobbie Stein
Attorney for Appellant Charles Edward Glasper:	Alan Siraco Under Appointment by the Sixth District Appellate Program
Attorney for Appellant Julie Ann Glasper:	Lyn A. Woodward Under Appointment by the Sixth District Appellate Program

People v. Glasper, et al.

H023404